91-1836

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LEONARD R. CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 14, 1992

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QUESTION PRESENTED

Does intentional official seizure and diversion of all of a prisoner's papers pertaining to his pending *pro se* federal litigation--forseeably causing their unjustifiable deprivation for several months--violate the constitutional right of court access, and warrant recovery of mental distress damages, shipping expense incurred in retrieving the papers, or a nominal award?

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II. The lower court's refusal to allow recovery of out-of-pocket loss and mental distress damages for violation of the constitutional right of court access is incompatible with *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) and *Carey v. Piphus*, 435 U.S. 247 (1978). 21

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In The

Supreme Court of the United States

October Term, 1991

LEONARD R. CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

Leonard R. Crawford-El petitions this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which answered no to the question presented.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit appears in petitioner's appendix ("App.") at 1a-16a and is reported at 951 F.2d 1314. The February 14, 1992 order denying rehearing is not

reported and appears at App. 26a. The May 10, 1990 Order of the United States District Court for the District of Columbia denying respondent's motion to dismiss is unreported and appears at App. 17a-18a. That court's unreported August 31, 1990 order granting respondent's motion for reconsideration, but allowing petitioner opportunity to amend his complaint, appears at App. 19a-23a. The district court's unreported December 21, 1990 order denying respondent's motion to dismiss the amended complaint appears at App. 24a-25a.

JURISDICTION

The judgment of the court of appeals was entered December 27, 1991. Rehearing was denied February 14, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Right of Court Access

The constitutional right of court access has been held to be an independent constitutional right derived from three constitutional provisions--the First Amendment right to petition for redress, the Due Process Clause, and the Privileges and Immunities Clause. *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983).

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

U.S. Const. amend. V (excerpt)

No person shall . . . be deprived of . . . liberty, or property, without due process of law.

U.S. Const. amend. XIV, Sec. 1 (excerpt)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.[1]

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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[1] The Fifth Amendment Due Process Clause embraces this restraint, and applies it to the District of Columbia. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Fifth Amendment Due Process Clause imposes on District of Columbia same restrictions as those imposed on states by Fourteenth Amendment's Equal Protection Clause).

STATEMENT OF THE CASE

Facts

In late July 1989 Mr. Crawford-El was one of several District of Columbia prisoners housed by contract in a Washington State prison. Though these prisoners had been there only since December, 1988, District officials decided to move them, and to reassign some of them, including Mr. Crawford-El, to federal custody. Ms. Britton was responsible for the transfer of the prisoners. She told Washington State authorities to send all of the prisoners' property to her office in Washington D.C. Washington State officials ordered Mr. Crawford-El and the other D.C. prisoners to surrender all of their property for boxing and shipping. Mr. Crawford-El complied. The property he surrendered included all of his papers pertaining to a pending federal court civil action he had filed *pro se*, as well as his only copies of administrative tort claims for injury and loss of property, and supporting evidence to prove those claims. Respondent's Appendix in the Court of Appeals ("C.A. App.") at 18, 28, 53-54 71-72.

Ms. Britton and Mr. Crawford-El were well-acquainted. Ms. Britton knew Mr. Crawford-El to be a frequent litigator and an outspoken critic of prison conditions. After Mr. Crawford-El invited newspaper reporters to the District's prison complex in Lorton, Virginia in 1986, resulting in an article quoting his criticisms, Ms Britton chastised Mr. Crawford-El and tried to have him placed in restrictive confinement. When this effort failed, she told him "so long as he was incarcerated she was going to do everything she had to to make it as hard for him as possible." C.A.App. 16, 123-125. During the flight to Spokane, Washington in December 1988, Mr. Crawford-El protested an officer's videotaping of him and other prisoners while they were handcuffed and leg-shackled. Ms. Britton, the

responsible official present, rejected his protests. After a December, 1988 newspaper article reported Mr. Crawford-El's accusation that the District had singled out for transfer to Washington State prisoners who had brought lawsuits against the D.C. prison system, C.A. App. 114-117, Ms. Britton spoke with Washington officials and branded Mr. Crawford-El a "legal troublemaker." C.A. App. 111. In the winter and spring of 1989 Mr. Crawford-El and many other D.C. prisoners submitted letters to the District Mayor announcing their intent to sue over the videotaping Ms. Britton had allowed on the flight to Spokane. (See the attachments to Mr. Crawford-El's brief in the Court of Appeals.)

In early August, 1989, Mr. Crawford-El and other D.C. prisoners, having surrendered all of their property to Washington State officials, were taken to Missouri. On August 18, 1989 Ms. Britton arrived. Mr. Crawford-El and D.C. prisoners James Neal and Danny Phillips each told her that his property included legal materials pertaining to current cases and that they needed these papers to seek judicial redress. C.A. App. 28, 73.

On August 19, 1989 Mr. Crawford-El arrived at Lorton. He learned that his property from Washington State was not there. He immediately wrote Ms. Britton requesting that his property be sent to him as soon as it was received by her; he stated he needed his legal materials for ongoing court cases. Mr. Crawford-El received no response to this letter. Subsequently, he wrote to the Director of the D.C. Department of Corrections, Walter Ridley, and asked him to locate and deliver his property to him. Mr. Crawford-El again mentioned his need for his legal materials. He received no response to this letter. C.A. App. 28, 33.

On September 7, 1989 Mr. Crawford-El was transferred to the Federal Correctional Institution (FCI) at

Petersburg, Virginia, en route to his final destination, FCI Marianna in Florida. At Petersburg, Mr. Crawford-El and fellow D.C. prisoner Kenneth Ward spoke with a Bureau of Prisons official named Mr. Bender, who advised them they could have their property sent to them upon arriving at their final destinations. Mr. Crawford-El and Mr. Ward called Ms. Britton by telephone and told her what Mr. Bender had said. Ms. Britton, however, believed D.C. prisoners had no right to have any of their property forwarded to a federal prison, and that federal prisons would not accept shipments of D.C. prisoner property. C.A. App. 54, 57, 74-75.

On September 28, 1989, Mr. Crawford-El, newly arrived at FCI Marianna, again wrote to Director Ridley, asking that Ms. Britton be directed to retrieve his property and mail it to him. Mr. Crawford-El again stated he needed his legal materials for ongoing cases. C.A. App. 33.

Mr. Crawford-El requested that attorney Robert Hauhart seek return of his property. By letter dated September 28, 1989 to District of Columbia Assistant Corporation Counsel Paul Quander, Mr. Hauhart requested that Mr. Crawford-El's property, and that of Kenneth Ward, be returned to them. In part, the letter stated:

> It is my understanding . . . that Ms. Britton has declined to provide Mr. Ward and Mr. Crawford, and others in similar circumstances, with their legal materials, and has refused to forward their personal property. [C.A. App. 31-32.]

On some day between mid-September and early October, 1989, Ms. Britton released Mr. Crawford-El's

property.[2] C.A. App. 55. Instead of sending it to FCI Marianna, however, Ms. Britton called Mr. Crawford-El's brother-in-law, Jesse Carter. She told him that Mr. Crawford-El was concerned about his property, including his legal materials. She asked Mr. Carter to come to her office and pick it up. Mr. Carter did so. Ms. Britton knew Mr. Crawford-El had not authorized Mr. Carter to receive his property.

Subsequently, at Mr. Crawford-El's request, Mr. Carter went to see Ms. Britton and told her Mr. Crawford-El wanted her to take the property back and deliver it to the Lorton Property Officer for mailing to FCI Marianna. Ms. Britton refused to do so. She said she did not see why Mr. Crawford-El was making such a big fuss about his property because as far as she was concerned he should be happy she did not throw it in the trash. She told Mr. Carter federal prisons would not accept shipments of D.C. prisoner property. C.A. App. 28-29, 57.

On October 10, 1989 Mr. Hauhart wrote a letter to Arthur Graves, Associate Director of the D.C. Department of Corrections. Following the suggestion of Mr. Reeder, a member of Mr. Graves's staff, Mr. Hauhart enclosed a copy of his letter to Mr. Quander and said:

> Mr. Reeder stated that to the best of his knowledge residents returning from Washington State would have their property forwarded by the Department to their final BOP destination. This is the

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[2] Ms. Britton says the day was October 5, 1989. C.A. App. 55. Other evidence indicates it was in mid-September. C.A. App. 38.

> goal I seek on behalf of Mr. Crawford and Mr. Ward, as my letter to Mr. Quander makes clear. I assume this constitutes a reversal of the policies being pursued by Ms. Britton which were the source of my complaint. Please advise me at your convenience if Mr. Reeder is correct so I may advise my clients of the policy the Department [in]tends to follow. [C.A. App. 34.]

On December 20, 1989 Mr. Hauhart again wrote Mr. Quander, who by then was Acting Deputy Director of the D.C. Department of Corrections. The letter was written on behalf of Mr. Crawford-El, Kenneth Ward, and two other D.C. prisoners, James Neal and Edward Ashford. The letter stated that the four prisoners still had not received their property. It said Mr. Crawford-El's property had been "released without permission to Jesse Carter (brother-in-law), 4241 58th Ave, Apt. 9, Bladensburg, Md. 20710, (301) 277-0675." The letter requested Mr. Quander to "direct appropriate staff to arrange for locating and properly forwarding" Mr. Crawford-El's property. C.A. App. 82-83.

On January 9, 1990, Mr. Quander wrote in reply to Mr. Hauhart's December 20 letter. Mr. Quander stated:

> As pointed out in the attached letter dated December 22, 1989 from Mr. P.S. Wise, Administrator, Correctional Programs Branch, Bureau of Prisons, clear guidance regarding the processing of property of DOC inmates who are transferred to federal custody is provided.
>
> We are therefore moving with deliberate speed to dispatch inmates property, including the four (4) individuals cited in your correspondence, in compliance with mentioned direction given by the Bureau of Prisons.

The attached December 22 letter from Mr. Wise stated:

> As has been our past practice, inmates transferring from DCDOC to BOP custody are permitted only a small amount of personal property which should be limited to personal care items and legal documents. [C.A. App. 79.]

Neither Ms. Britton, nor any other District of Columbia official, contacted Mr. Carter or any member of Mr. Crawford-El's family to retrieve Mr. Crawford-El's property and to forward it to him by mail from the Department of Corrections.

Mr. Crawford-El asked his mother to mail his property to him. She did so, at his expense. Because the property was mailed outside prison channels, federal BOP officials at FCI Marianna initially refused to allow Mr. Crawford-El to receive his property. He submitted an administrative complaint through federal prison channels demanding that he be allowed to receive his property. The complaint caused several FCI Marianna officers and officials to become annoyed with and hostile to Mr. Crawford-El. Mr. Crawford-El's administrative complaint ultimately succeeded. He finally was allowed to receive his property in February, 1990, over half a year after he had surrendered it to Washington State officials. C.A. App. 17-18.

District Court Proceedings

Mr. Crawford-El, appearing *pro se*, filed this case in November, 1989. He named Ms. Britton and the District of Columbia government as defendants. The district court

granted the District of Columbia's motion to dismiss.[3] App. 17a. The court denied Ms. Britton's first dismissal motion. *Id.* On her request for reconsideration, however, the court held she would be entitled to dismissal on the ground of qualified immunity unless Mr. Crawford-El amended his complaint to allege intent and injury more specifically. App. 19a-23a.

Mr. Crawford-El's amended complaint and accompanying submissions set forth the facts indicating Ms. Britton's hostility toward him and said that her withholding and diversion of his legal papers caused, among other things, mental distress, the expense of having his mother ship his property to him, and dismissal of a federal court suit. C.A. App. 17-18. The district court denied Ms. Britton's motion to dismiss the amended complaint. App. 24a-25a.

Ms. Britton noted an interlocutory appeal of her claim of qualified immunity, as allowed by *Mitchell v. Forsyth*, 472 U.S. 511 (1985). While her interlocutory appeal was pending, Mr. Crawford-El retained counsel and filed an amended complaint against the District of Columbia.[4] After

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[3] The complaint, which raised only federal constitutional claims, contained no allegation that District of Columbia customs, policies, or practices had caused Ms. Britton's constitutional violations. See *Monnell v. Department of Social Services*, 436 U.S. 658 (1978).

[4] This amended complaint alleged District of Columbia customs, policies, and practices indicating the District's liability for Ms. Britton's constitutional violations. This complaint also presented a procedural due process claim not raised against Ms. Britton and requested injunctive relief against future unreasonable deprivations of Mr. Crawford-El's legal papers.

the decision by the Court of Appeals, and in accordance with that decision, App. 16a, Mr. Crawford-El filed a motion for leave to file an amended complaint against Ms. Britton, as well as the District of Columbia.[5] The district court granted this motion May 5, 1992.

Appellate Proceedings

Ms. Britton's Argument

In her interlocutory appeal, Ms. Britton presented one argument:

> The summary judgment record in this case refutes appellee's assertion that Ms. Britton intended to impede his access to the courts by not sending the boxes that contained his property. She was complying with her understanding of Bureau of Prisons policy.

Brief for Appellant at 11-12.[6]

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[5] The amended complaint includes Mr. Crawford-El's right of court access claim, but does not assert that Ms. Britton's seizure, withholding, and diversion of his legal papers caused dismissal of his litigation. Only mental distress and out-of-pocket loss (the shipping charges) are claimed. The motion accompanying this complaint conceded that the right of court access claim does not meet the legal standards set by the Court of Appeals and will be valid only if that court's decision is reversed by this Court.

[6] Based solely on this argument, Ms. Britton claimed that Mr. Crawford-El's complaint failed to meet the D.C. Circuit's "heightened pleading standard" for claims involving unconstitutional motive, *Siegert v. Gilley*, 895 F.2d 797 (D.C.

(footnote continued on next page)

Ms. Britton did not deny that, under law clearly established at the time of her actions, the constitutional right of court access embraced Mr. Crawford-El's right to possess his legal papers. Nor did she deny that her lengthy seizure, withholding, and diversion of Mr. Crawford-El's legal papers posed a foreseeable risk of injury to that right. She made no claim, moreover, that Mr. Crawford-El's allegations of injury were insufficient.

Mr. Crawford-El's Arguments

Mr. Crawford-El argued that his *pro se* submissions properly pleaded, and proffered evidence to support, two constitutional claims under clearly established law. First, he argued the evidence supported a claim that Ms. Britton's withholding and diversion of all of his property, including the clothing, etc., was in retaliation for his exercise of First Amendment rights--namely, his

> authorized communication with newspaper reporters, the content of the resulting newspaper articles, plaintiff's litigation seeking redress of grievances, and his complaint to the Mayor and contemplated litigation against her stemming from the videotaping of plaintiff and other prisoners on the flight to Spokane.

Brief for Appellee at 14. Second, Mr. Crawford-El argued that "Ms. Britton's withholding and diversion of legal materials plaintiff needed to pursue judicial redress, even if not motivated by retaliatory animus, violated plaintiff's

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Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), and that she therefore was entitled to qualified immunity.

constitutional right of access to the courts." Brief for Appellee at 19.

Mr. Crawford-El argued that appellate court precedents had found the right of court access--recognized by this Court in *Bounds v. Smith*, 430 U.S. 817 (1977)--to be rooted in three constitutional provisions: the First Amendment right to petition for redress, the Due Process Clause, and the Privileges and Immunities Clause. Brief for Appellee at 15, n.6, *citing Simmons v. Dickhaut*, 804 F.2d 182 (1st Cir. 1986). He argued that the right of court access embraces a prisoner's right to timely, secure access to legal papers needed to pursue judicial redress. Brief for Appellee at 20-21, *citing Simmons*, *supra*, and *Carter v. Hutto*, 781 F.2d 1028, 1032 (4th Cir. 1986). In this regard, Mr. Crawford-El stressed the contribution of the Due Process Clause to the right of court access:

> Since the violation of plaintiff's right of access to the courts was perpetrated by depriving him of property needed to exercise that right, the due process clause origins of the right of court access, *Simmons*, 804 F.2d at 183, are especially noteworthy in this case. The due process clause contributes to the constitutional right of court access a substantive due process right not to be unreasonably deprived of property needed to seek judicial redress.

Brief for Appellee at 20, n.9.[7]

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[7] The Court of Appeals incorrectly assumed that by "unreasonably deprived" we meant "negligently deprived." App. 7a. What we meant by "unreasonable," however, was not "'reasonably related' to legitimate penological objectives," the standard set by this Court in *Turner v. Safley*, 482 U.S. (footnote continued on next page)

Mr. Crawford-El argued that Ms. Britton's lengthy withholding of his legal papers violated his right to timely access to them because "[s]he deprived plaintiff of his court papers for a period far longer than the periods established by court rules for responding to motions and discovery requests." Brief for Appellee at 21-22. He also argued that

> Ms. Britton's subsequent diversion of his legal papers outside prison control to a person unauthorized to receive them--a tortious act under the common law, *Fotos v. Firemen's Ins. Co.*, 533 A.2d 1264, 1267 (D.C. 1987)--deprived plaintiff of secure, as well as timely, access to these materials.

Id. at 22.

Mr. Crawford-El argued Ms. Britton was liable for the unconstitutional withholding and diversion of his legal

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78, 87 (1987). Appellee's Petition for Rehearing ("Reh. Pet.") at 3, n.2. In this regard, Ms. Britton never "put forward" a legitimate governmental interest justifying her lengthy withholding and diversion of Mr. Crawford-El's legal materials, *Turner*, 482 U.S. at 89. The Court of Appeals nonetheless raised, though it did not decide, "if Britton's delivery of the boxes to Carter was a reasonable means of securing their safe transfer." App. 7a. The court, however, cited no evidence raising this question. The record shows Ms. Britton gave the boxes to Mr. Carter not to secure their safe transfer to Mr. Crawford-El, but because she erroneously believed federal Bureau of Prisons policy would not allow Mr. Crawford-El to receive them. See the discussion, *supra*, at 6-7, and Ms. Britton's argument in the Court of Appeals, quoted, *supra*, at 11.

papers because (1) his right to possess them was clearly established before August 1989, *Simmons v. Dickhaut*, 804 F.2d 182 (1st Cir. 1986); *Carter v. Hutto*, 781 F.2d 1028, 1032 (4th Cir. 1986); Brief for Appellee at 21; and (2) as of August 18, 1989, she knew his property contained papers he needed to seek judicial redress. *Id.* at 7.

He also argued, however, an alternative basis for her liability--her having ordered the lengthy seizure of all of the property of a large group of prisoners:

> Prison officials in Ms. Britton's position know that substantial numbers of prisoners have active legal cases, including postconviction proceedings and litigation brought *pro se*, and that wholesale, long-term deprivation of all the property of a large group of prisoners is certain to result in deprivations of the kinds of legal materials at issue in plaintiff's case.

Id. at 19-20, n.8. Given the foreseeability of this consequence, Mr. Crawford-El argued Ms. Britton would be liable to any prisoner in the group who was deprived of papers needed for pending litigation, even if she did not know which prisoners' property contained such papers.[8]

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[8] The Court of Appeals mischaracterized this argument as saying "officials in Britton's position are aware that many prisoners have active legal papers, so that there should be no need to offer specific evidence of awareness of a parcel's contents." App. 7a. As Mr. Crawford-El's rehearing petition noted, at 7, n. 7 :

> This mischaracterization of our argument chops out the key fact--long-term seizure of *all* of the property of a *large group* of prisoners. It is only when officials engage

(footnote continued on next page)

Mr. Crawford-El's brief, at 12 and n.5, said his *pro se* complaint alleged Ms. Britton's lengthy withholding and diversion of his legal papers caused him to incur shipping expenses and mental distress, and to suffer dismissal of one of his federal civil actions. None of these injuries was disputed by Ms. Britton. At oral argument, however, counsel conceded that Mr. Crawford-El would have difficulty proving that the deprivation of his legal papers caused the dismissal of one of his federal actions, because, fortuitously, defense counsel's letters to the court in that case had led to extension of litigation deadlines. C.A. App. 105-109. Nonetheless, counsel maintained that Mr. Crawford-El's mental distress and out-of-pocket loss were cognizable injuries, and that, even if this were not true, an award of nominal damages would be allowed.[9]

The Decision of the Court of Appeals

The Court of Appeals addressed only Mr. Crawford-El's claim under the constitutional right of court access.[10] The

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> in such mass seizures, as Ms. Britton did here, that the resulting deprivation of *someone's* legal papers, even absent actual knowledge of parcel contents, becomes so likely as to be reasonably foreseeable. Reasonable foreseeability of harm is sufficient to impose liability under 42 U.S.C. § 1983. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). [Emphasis in original.]

[9] Mr. Crawford-El pressed this point again in his rehearing petition, at 9, where he cited the pertinent cases.

[10] The court held the *pro se* complaint failed to raise the First Amendment retaliation claim. App. 3a. Mr. Crawford-El was

(footnote continued on next page)

court held that, under law clearly established well before Ms. Britton's activities in 1989, "Crawford-El had a constitutional right against any official who [deprived him of] access to active legal files" in a manner manifesting "deliberate indifference" to a "foreseeable" "likelihood" of interference with litigation. App. 9a, 8a. The court held deliberate indifference to likely interference with litigation to be encompassed within intentional interference with litigation. App. 8a.[11]

The court then turned to the question of injury. It surveyed case law defining circumstances in which deprivation of a prisoner's legal papers is actionable even in the absence of actual injury. App. 14a-15a. The court found the

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not harmed by this ruling, since the court allowed him to amend his complaint to raise this claim. App. 16a. The district court granted leave to amend on May 5, 1992.

[11]The court, however, did not address whether deprivation of all papers pertaining to pending litigation, for half a year, presents a likelihood of interference with that litigation. Nor did the court address whether such a lengthy deprivation was a foreseeable consequence of Ms. Britton's actions. The court also did not address whether Ms. Britton's asserted reason for the deprivation--erroneous understanding of Bureau of Prison policy--reflected ignorance of, and therefore deliberate indifference to, Mr. Crawford-El's clearly established constitutional right. Instead, the court addressed only whether the evidence would support a finding that Ms. Britton actually intended to interfere with Mr. Crawford-El's litigation. App. 10a-13a. The court held it would. App. 13a. The court therefore rejected Ms. Britton's claim to the contrary, the only argument she raised.

precedents consistently have held that absolute or long-term deprivations, or those that implicate general policies, require no showing of actual injury. A showing of injury is required only for short-lived deprivations that do not implicate general policies, or for interferences that are merely conditional restrictions, not absolute deprivations.

The court of appeals, however, rejected the standards adopted by these cases. Instead, it held that any "isolated episode of interference with [a prisoner's] right of access to . . . legal materials"--whether long-term or short-lived, whether an absolute deprivation or a conditional restriction--requires a showing of actual injury. The court then held Mr. Crawford-El was required to show actual injury, but it never discussed whether the deprivation of his legal papers in fact was "an isolated episode."[12]

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[12] The court did not mention that Mr. Crawford-El's papers had been taken from him as part of a mass seizure of all the property of all of the D.C. prisoners housed in Washington State. (This mass seizure, by itself, threatened harm to any prisoner facing imminent litigation deadlines. It took Ms. Britton and her colleagues several weeks simply to transport the prisoners to their final destinations, let alone to deliver their property thereafter.) The court did not mention that this seizure reflected an executive officer's standard practice, and was not a random, unauthorized act of a prison guard, like the seizure in *Hudson v. Palmer*, 468 U.S. 517 (1984). The court also did not mention that Ms. Britton's rationale for diverting Mr. Crawford-El's papers outside the prison system was applied by her to a large category of prisoners--all those bound for federal institutions. Nor did the court mention that high-level officials including a lawyer, when informed that Ms. Britton had refused to deliver the legal papers of many prisoners sent to federal facilities, responded not with (footnote continued on next page)

The court went even beyond the imposition of an actual injury requirement. It held that only one type of injury was sufficient--injury to litigation. "[T]he character of [the] right," announced the court, "defines the injury requirement." App. 16a. To support this broad pronouncement of constitutional law, however, the court cited no precedent.

REASONS FOR GRANTING THE WRIT

I.

The lower court's holding that the constitutional right of court access is not violated by lengthy, intentional, unjustified deprivation of all of a prisoner's legal papers--unless injury to litigation actually results--conflicts with the decisions of other circuits and is incompatible with *Bounds v. Smith*, 430 U.S. 817 (1977).

In *Bounds v. Smith*, 430 U.S. 817 (1977), this Court held that denial of legal assistance or a law library violates prisoners' constitutional right of court access. The prisoners in that case prevailed though they demonstrated no actual injury to pending or contemplated litigation.

All Courts of Appeals that have considered the matter, including the court below, have extended *Bounds* to protect prisoners' access to their legal papers. App. 6a-7a. With the exception of the court below, moreover, the Courts of Appeals have held that absolute or long-term deprivation of

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immediate corrective action, but with a time-consuming inquiry into whether federal policy really allowed prisoners to receive them. The deprivation of Mr. Crawford-El's legal papers clearly implicated Department of Corrections policy.

legal papers, or deprivations implicating institutional policy, may be challenged without a showing of actual injury. *Sowell v. Vose*, 941 F.2d 32, 35 (1st Cir. 1991); *Chandler v. Baird*, 926 F.2d 1057, 1063 (11th Cir. 1991); *Sands v. Lewis* 886 F.2d 1166, 1169-71 (9th Cir. 1989); *Peterkin v. Jeffes*, 855 F.2d 1021, 1039-42 (3d Cir. 1988); *Hossman v. Spradlin*, 812 F.2d 1019, 1022 (7th Cir. 1987); *Holloway v. Dobbs*, 715 F.2d 390, 392 (8th Cir. 1983).

In holding that intentional deprivation of Mr. Crawford-El's legal papers for half a year, even if unjustified, was not actionable in the absence of actual injury, the court below sharply departed from *Bounds* and the decisions of all other circuits. This Court should resolve this conflict over the reach of the constitutional right of court access.

The court below held that, absent injury, Ms. Britton's intentional conduct, even if unjustified by penological interests, was not actionable at all, despite the foreseeable risk of harm it presented. Under the reasoning below, the constitutional right of court access did not even allow Mr. Crawford-El to sue for return of his papers. The court held that availability of relief from Ms. Britton's conduct depended on a fortuity, whether steps by others happened to avert the harm her acts made foreseeable. The court insulated the wrongdoer from judicial command to reverse her course before injury was inflicted, and placed the burden of averting harm on others--the prisoner, the other parties to the prisoner's litigation, and the court hearing that litigation. C.A. App. 105-109.

The Court should review the decision below and hold that intentional, unjustified deprivation of a prisoner's legal papers is actionable--that it warrants equitable relief and, in the absence of injury, award of nominal damages. *Carey v. Piphus*, 435 U.S. 247 (1978).

II.

The lower court's refusal to allow recovery of out-of-pocket loss and mental distress damages for violation of the constitutional right of court access is incompatible with *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) and *Carey v. Piphus*, 435 U.S. 247 (1978).

The lower court's holding that "the character" of a constitutional right "defines the injury requirement," App. 16a.--and that mental distress damages and out-of-pocket losses therefore are not recoverable for violation of the right of court access--cannot be squared with *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306-311 (1986) (out of pocket and mental distress damages recoverable for deprivation of liberty and property without due process, and for violation of First Amendment right to academic freedom), or with *Carey v. Piphus*, 435 U.S. 247 (1978) (mental distress damages, or nominal damages, recoverable for procedural due process violation), or with the lower court's own precedent, *Hobson v. Wilson*, 737 F.2d 1, 61-62 (D.C. Cir. 1984) (mental distress damages recoverable for violation of First Amendment right of political association).

The lower court cited no case to support its "character of the right" restriction on elements of damage, and the court did not discuss *Stachura* and *Carey*. The Court of Appeals, furthermore, did not explain how its own reasoning disallowed recovery of out-of-pocket expenses incurred in replacing or retrieving wrongfully deprived legal papers. The court acknowledged the Due Process Clause root of the right of court access. App. 3a, n.1. That clause provides explicit protection from unreasonable deprivation of property. If the "character of the right" is the controlling criterion, are not replacement or retrieval costs precisely the kind of damage

most likely to be expected when property is wrongly deprived?[13]

The lower court's broad, unprecedented pronouncement that the character of a constitutional right strictly limits the damage elements that can be recovered--and precludes recovery for some clearly foreseeable losses and injuries--should be reviewed by this Court.

CONCLUSION

For these reasons, Mr. Crawford-El's petition should be granted.

Respectfully submitted,

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Counsel of Record for Petitioner

May 14, 1992

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[13] Nor did the court explain why its principle did not support recovery of mental distress damages in cases involving wrongful seizures of legal papers. Is not deprivation of property needed to pursue a constitutional liberty a wrong which would be expected to cause mental distress?

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1991, Decided December 27, 1991

No. 91-7023

LEONARD ROLLON CRAWFORD-EL,
Appellee

v.

PATRICIA BRITTON AND DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Appellants

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 89-03076)

Edward E. Schwab, Assistant Corporation Counsel, Office of the Corporation Counsel, with whom *John Payton*, Corporation Counsel, and *Charles Reischel*, Deputy Corporation Counsel, Office of the Corporation Counsel, were on the brief, for appellants. *Lutz Alexander Prager*, Attorney, Office of the Corporation Counsel, also entered an appearance for appellants.

Daniel M. Schember for appellee.

Before: BUCKLEY and WILLIAMS, *Circuit Judges*, and Alan D. Lourie,* *Circuit Judge*, U.S. Court of Appeals for the Federal Circuit.

Opinion for the Court filed by *Circuit Judge* Williams.

WILLIAMS, *Circuit Judge*: Because of overcrowding in the District of Columbia prison system, plaintiff Leonard Rollon Crawford-El was shuffled about between its Lorton, Virginia facility and several other places of custody. He was first transferred in December 1988 to the Spokane County Jail in the state of Washington, then in the late summer and early fall of 1989 back to Lorton, and ultimately to a federal prison in Marianna, Florida, where he arrived in September 1989. Defendant Patricia Britton, a District of Columbia corrections officer, had charge of arranging his journeys. At the time, he owned three boxes containing clothes and papers relating to several pending lawsuits. At some point (by his account in August or September 1989, by hers in October 1989), Britton delivered the boxes to Crawford-El's brother-in-law, Jesse Carter, rather than simply shipping them to him at the next destination. Some time later Crawford-El's mother secured the boxes and shipped them to him in Florida, where they reached him in February 1990.

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

Crawford-El sued Britton for damages under 42 U.S.C. § 1983, claiming that her misdelivery of his legal papers to Carter was an intentional interference with his constitutional right of access to the courts. In support he alleged (among other things) various prior conversations between himself and Britton that suggested both her awareness that the boxes contained active legal files and her wish to do him harm. (We review the details below.)

In his brief here Crawford-El also argues that Britton retaliated against him for exercising his First Amendment rights. See Appellee's Brief at 14-19. The complaint makes no reference to this First Amendment claim, however, and the district court quite reasonably did not understand it as raising such a claim, see *Crawford-El v. Britton*, No. 89-3076, Order at 1, Joint Appendix ("J.A.") at 8[1] so we do not consider it here. See *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984).

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[1]The district court did read the complaint as claiming a violation of Crawford-El's due process rights under the Fifth Amendment. *Id.* This appears to be substantively indistinguishable from the access to courts claim, which courts have traced to several constitutional provisions, including the First Amendment, the due process clause, and the privileges and immunities clause. See, e.g., *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983). The parties have not addressed any arguments here to a distinct due process claim, and we do not consider it.

Britton moved for dismissal of the complaint and for summary judgment. She asserted a qualified immunity defense under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), arguing that the plaintiff's claims do not make out a violation of any constitutional right "clearly established" at the time of her acts, *id.* at 818. She also argued that the plaintiff had failed to satisfy the "heightened pleading standard" that this circuit applies to damage actions against government officials. The district court denied the motion, *Crawford-El v. Britton*, No. 89-3076, Order (D.D.C. Dec. 21, 1990), and she appeals.

We hold that the complaint has not satisfied our heightened pleading standard, but remand the case to the district court for repleading and reconsideration in light of our opinion.

I.

Our jurisdiction is limited to whether at this stage Crawford-El's claim withstands the qualified immunity defense and satisfies the heightened pleading standard. A district court's rejection of a qualified immunity defense is immediately appealable under the "collateral order" exception to 28 U.S.C. § 1291's requirement of finality, to the extent it turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985). Otherwise trial court error could defeat much of the defense's purpose -- to protect officials not only from liability but also from undue burdens of litigation. To determine the relevant facts, we look not only to the pleadings but to the entire record on appeal, viewed, as under Fed. R. Civ. P. 56, in the light most favorable to the party opposing summary judgment (except for the heightened pleading requirement discussed below). See, e.g., *Elliott v. Thomas*, 937 F.2d 338, 341-42 (7th Cir. 1991); *Unwin v. Campbell*, 863 F.2d 124, 130-33 (1st Cir. 1988).

We do not apply the summary judgment model pure and simple, however, as the plaintiff has not yet secured discovery. *Harlow*, 457 U.S. at 818 (discovery should not be allowed until qualified immunity issue is resolved). Our heightened pleading requirement insists that, before discovery, plaintiffs suing government officers for damages set forth "'nonconclusory allegations' that are 'sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds.'" *Andrews v. Wilkins*, 934 F.2d 1267, 1269-70 (D.C. Cir. 1991) (quoting *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984)). Because application of the heightened pleading standard precedes discovery, the assumptions of ordinary summary judgment are (as we shall see) not fully applicable.

We note that some of Britton's arguments on appeal take the form of a simple denial -- an "I didn't do it" defense. Immediate review of the district court's treatment of those issues is beyond the scope of *Mitchell's* exception, which exists to supply early review of the *law* "clearly established" at the relevant time. See, e.g., *Elliott v. Thomas*, 937 F.2d at 341-42; *Kaminsky v. Rosenblum*, 929 F.2d 922, 925-26 (2d Cir. 1991); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 n.8 (3d Cir. 1988); *Lion Boulos v. Wilson*, 834 F.2d 504, 509 (5th Cir. 1987); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987).

II.

To determine whether Britton's qualified immunity defense prevails, we first consider what state of mind must have accompanied her misdelivery of Crawford-El's legal papers to render that action a constitutional tort (or, more precisely, what state of mind would a reasonable officer at the time of the alleged misdelivery have thought rendered it

unconstitutional).[2] Although a purpose of the reasonable-officer standard is to enable a court to decide on qualified immunity without intrusive discovery, *Harlow*, 457 U.S. at 815-19, we have understood *Harlow* to allow inquiry into motive where a bad one could transform an official's otherwise reasonable conduct into a constitutional tort. See *Siegert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991); *Whitacre v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989); *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1431 (D.C. Cir. 1987); *Halperin v. Kissinger*, 807 F.2d 180, 185-87 (D.C. Cir. 1986); *Hobson v. Wilson*, 737 F.2d at 29-31; compare *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011, 1017 (D.C. Cir. 1991) (no state of mind could make the specified conduct unconstitutional).

Well before defendant's activities in 1989 the Supreme Court decided that prisoners have a general right of access to law libraries or legal assistance. See *Bounds v. Smith*, 430 U.S. 817, 821-25 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). But it doesn't follow that any interruption in Crawford-El's access to his papers was unconstitutional. Prison officials have considerable discretion to implement policies for the administration of correctional facilities and are free to formulate rules (including regulation of inmates' property) that impinge on fundamental rights so long as they are " 'reasonably related' to legitimate penological objectives". *Turner v. Safley*, 482 U.S. 78, 87 (1987). At a minimum, if

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[2] Crawford-El associates the misdelivery with his transfer from Lorton to another prison in Petersburg, Virginia on the way to Florida in August or September 1989, whereas Britton states she delivered the boxes to Carter on October 5, 1989. See Affidavit of Patricia Britton at 3 (Mar. 26, 1990), J.A. at 55. We are aware of no cases between August and October 1989 that would change our analysis.

Britton's delivery of the boxes to Carter was a reasonable means of securing their safe transfer, it would not violate his *Bounds* right.[3]

Plaintiff argues that any "unreasonable" (by which he appears to mean "negligent") withholding or misdelivery of property would violate the *Bounds* right if the parcel contains active legal files. He suggests that prison officials in Britton's position are aware that many prisoners have active legal papers, so that there should be no need to offer specific evidence of awareness of a parcel's contents. Appellee's Brief at 19-20 n.8.

Though Britton's position is more obscure, she implicitly and correctly recognizes that it was clear by 1989 that an officer who interfered with the transmission of an inmate's legal papers for the purpose of thwarting the inmate's litigation violated his constitutional right of access to the courts. See, e.g., *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986); *Carter v. Hutto*, 781 F.2d 1028, 1031-32 (4th Cir. 1986); *Tyler v. "Ron" Deputy Sheriff*, 574 F.2d 427, 429 (8th Cir. 1978); cf. *Jackson v. Procunier*, 789 F.2d 307, 310-11 (5th Cir. 1986) (allegation that prison officials deliberately held up inmate's mailing of *in forma pauperis* petition stated claim for constitutional violation); *Washington v. James*, 782 F.2d 1134, 1138-39 (2d Cir. 1986) (interference with legal

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[3] At worst, the act might constitute a common law conversion, *Fotos v. Firemen's Ins. Co.* 533 A.2d 1264, 1267 (D.C. 1987), but that is a separate question that has no direct bearing on whether the act violated Crawford-El's *Bounds* right. We reject hs contention to the contrary. See Appellee's Brief at 22.

mail states claim for violation of right of access).[4] Under this specific intent standard, Britton's act would constitute a violation of Crawford-El's *Bounds* right only if she knew his property contained legal papers relevant to pending litigation *and* she diverted the property with the purpose of interfering with his litigation, or at least with deliberate indifference to such interference. (Hereafter we use "intent to interfere" as encompassing deliberate indifference.)

It cannot, however, be said that anything like Crawford-El's proposed negligence standard was clearly established in 1989 (or now, for that matter). Perhaps the broadest ruling is *Jackson v. Procunier*, which held a *Bounds* claim would be shown if "mail officers *deliberately* held up [the plaintiff's] mail when they *should reasonably have known* that the delay would deprive him of his right of access to the courts". 789 F.2d at 311 (emphasis added). The delayed envelope stated that it contained legal materials that had to be in court by a specific date one week later, *id.* at 308, and the resulting delay cost the prisoner dismissal of his appeal. Thus, the court was presumably holding that it was enough to allege knowing delay of legal papers, with awareness of some (at least nontrivial) *likelihood* that the delay would defeat the inmate's claim. The other cases appear similarly to require either an intent to thwart the prisoner's access to courts, or at a minimum deliberate or reckless indifference to a foreseeable disruptive effect. See, e.g., *Simmons v. Dickhaut* 804 F.2d at

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[4] Our circuit has not spoken to this issue. However, the unanimity among those circuits that have done so, together with the fact that "[i]t follows logically [from *Bounds*] that the allegation of intentional violation of the right of access to the courts states a cause of action under § 1983", *Simmons v. Dickhaut*, 804 F.2d at 183, suggests that a reasonable official would know that intentional deprivation of the *Bounds* right violates the Constitution.

184 (inmate claimed prison officials withheld legal material from property returned to him, although he three times requested and identified it); *Carter v. Hutto*, 781 F.2d at 1031-32 (inmate claimed that prison officials deliberately seized and destroyed handwritten notes of his trial, the basis of his habeas claim); *Patterson v. Mintzes*, 717 F.2d 284, 288-89 (6th Cir. 1983) (inmate denied access to his transcripts and legal papers necessary for court appearance despite several specific requests identifying his critical dependence on the documents). Thus, while the cases "clearly establish" that Crawford-El had a constitutional right against any official who interfered with his access to active legal files with intent to impair that access, they do not establish the broader right that he claims.

Quite apart from the issue of qualified immunity, we doubt if an act such as Britton's could violate the *Bounds* right unless done with an intent to interfere with litigation (or, to repeat, with deliberate indifference to such interference). If it could, a prisoner could easily transform almost any negligent delay in the transfer of his property (which would not otherwise violate the Constitution, see *Daniels v. Williams*, 474 U.S. 327, 336 (1986) into a constitutional tort if the property contained active litigation papers. Defendant's theory, that officials are generally aware that prisoners are frequently engaged in litigation and should be liable for any negligent delay, could extend (for example) to any mail carrier handling prison mail and negligently delaying its delivery.

Accordingly, to withstand Britton's motion to dismiss, Crawford-El must have made specific nonconclusory allegations showing that Britton knew his property contained legal materials relating to pending cases *and* that she diverted his property with the intention of interfering with his litigation.

On the first point, Crawford-El claims to have informed Britton that his boxes contained legal papers:

> On Friday August 18, 1989, I spoke to defendant Patricia Britton at the Western Missouri Correctional Center [while en route from Washington State back to Lorton]. D.C. offenders Danny Phillips and James Neal and I were talking to Britton and each informed her that our legal material pertaining to current cases was in our property and was necessary in order for us to seek redress from the courts.

Affidavit of Leonard Crawford-El at 1 (May 3, 1990), J.A. at 73; see also Complaint at 2, J.A. at 28.

Crawford-El also alleges specific facts suggesting an intention to interfere with his pursuit of his legal claims. *First*, he has provided evidence of Britton's general hostility to him. He alleges[5] that after he was quoted by reporters in an April 20, 1986 *Washington Post* article criticizing conditions at Lorton, Britton rebuked him for cooperating with the reporters and "told plaintiff that so long as he was incarcerated she was going to do everything she had to make it as hard for him as possible as a result of his having met and spoke [sic] with the reporters and for allegedly embarassing [sic] her before her coworkers thru the article." Amended Complaint at 2 (Sept. 6, 1990), J.A. at 16.

Crawford-El also states that after his transfer to Spokane he was quoted several times in a December 17, 1989 [sic; presumably *1988*] *Washington Post* article about the

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[5] The facts are described below according to Crawford-El's allegations and offers of proof; for the purposes of this appeal we do not have jurisdiction to consider Britton's denials of certain allegations, for the reasons set forth in Part I.

transfer, and thereafter "was locked down and officials there informed him that Defendant Britton had told them Plaintiff was a 'Troublemaker'." *Id.* This adds only a very little; we suspect that even prison officials free of hostility toward Crawford-El might regard "troublemaker" as an apt moniker.

Crawford-El's final claim of general hostility is that he learned (from an unidentified source) that Britton, after conveying his property to Carter, had told Carter that Crawford-El "should be happy she did not throw it in the trash." Complaint at 3, J.A. at 29. This contention is undermined by Crawford-El's acknowledgment of Carter's statement that Britton, when asking him to pick up the property, had told him she was afraid it might otherwise be lost. *Id.*

Two of these assertions appear to be pure hearsay -- Crawford-El's statements that "officials" at Spokane told him that Britton told them Crawford-El was a "troublemaker" and that someone (Carter?) told him that Britton had said Crawford-El was lucky she did not throw his property in the trash. Normally such hearsay would not be enough to raise an issue of fact for summary judgment purposes. See Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); see also 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2738, at 470-74 (2d ed. 1983). Britton may have waived the objection, see *id.* at 507-09; *In re Teltronics Services, Inc.*, 762 F.2d 185, 1192 (2d Cir. 1985), but the more important point is that there has been no opportunity for discovery. Accordingly, the heightened pleading requirement demands only that plaintiff "relate[e] the pertinent information that is already in his possession." *Hunter v. District of Columbia*,

943 F.2d 69, 76 (D.C. Cir. 1991). Inadmissible hearsay reports of the defendant's *specific* statements indicating malicious intent can satisfy that standard. Counsel involved in the drafting of such reports will doubtless be alert to the possible Rule11 hazards.

Second, Crawford-El bolsters the impact of Britton's statements with a claim of disparate treatment: He alleges that he and other prisoners who had complained about being videotaped during the transfer were not sent their property, whereas others being transferred were sent theirs. See Affidavit of Leonard Crawford-El at 4-5, J.A. at 76-77 (asserting that D.C. inmates who filed notices of intent to sue over the videotaping and/or were named as plaintiffs in the lawsuit over the videotaping, "experienced the same intentional deprivations as plaintiff at the hands of Britton who is also a defendant" in that case, whereas "D.C. offender John McNeil and others [being transferred from Washington State] property was [sic] in R + D in Lorton and given to them"); see also Attachments to Appellee's Brief at 1-14, J.A. at 82-87 (copy of complaint in *Alton Best v. District of Columbia*, lawsuit over videotaping); Attachments to Appellee's Brief at 38-45 (notices of intent to sue by Crawford-El, James Neal, Danny Phillips, and Kenneth Ward).

Third, Crawford-El states that prison authorities would not permit him to receive property mailed outside prison channels, even by a family member. Complaint at 4, J.A. at 30. Thus, when his mother finally mailed him his property, he was initially denied access to the materials and secured them only by filing an administrative complaint with the Marianna, Florida warden. Amended Complaint at 3, J.A. at 17. If Britton was aware of the practice, this would supply a reason why she could have believed that delivery to Carter might thwart Crawford-El's litigation efforts.

Taking Crawford-El's allegations and supporting evidence of unconstitutional motive as a whole, we find them "specific and concrete enough to enable [Britton] to prepare a response, and . . . a motion for summary judgment based on qualified immunity." *Whitacre v. Davey*, 890 F.2d at 1171. The allegations in *Martin v. D.C. Metropolitan Police Department*, which we rejected, 812 F.2d at 1435, were by comparison quite vague. The plaintiff claimed that he had been arrested for burglary in retaliation for a civil lawsuit that he pressed against certain officers who had beaten him with nightsticks in an episode captured on videotape and broadcast on the local news. His arrest was by *other* police officers, and against them plaintiff could only claim that they had reviewed the videotape of the beating; that he was the only person identified and prosecuted as a result; that defendants worked closely with the prosecutor on the case; and that an unusually large number of officers arrested him. *Id.* Here Crawford-El has identified specific statements by Britton to him and others showing awareness that his boxes contained litigation papers and that she was hostile; and he has identified specific persons also involved in documented legal conflict with Britton and (according to him) subjected to adverse treatment of their property, in contrast with others. For summary judgment purposes Britton should be able to meet these assertions with specific affidavits.

Although Crawford-El has adequately specified evidence of Britton's intent, he has offered none showing that Britton's actions actually deprived him of his right of access to courts. While our past decisions have mainly focused on the need for specifics bearing on the intent element of a constitutional damage action, *Hunter v. District of Columbia* makes clear that the policy behind the qualified immunity defense -- concern over "the social cost of distracting government officials with litigation", 943 F.2d at 75 --

requires that the complaint as a whole satisfy the heightened pleading standard.

Some of Crawford-El's damage allegations relate to impacts on his litigation -- assertions that the delay "made it impossible for him to proceed in an organized manner," Amended Complaint at 4, J.A. at 18, that he was "prevented from assisting his attorneys . . . in that he was not able to refer to his records and notes", *id.*, that his "filing of several small claims in D.C. was delayed unnecessarily", *id.*, and that the defendant's acts "were the proximal [sic] cause of the dismissal of one pro se case [with a specific title]". Except for the one reference to dismissal of a case, unsupported by any detail, none of these shows actual deprivation of access to the courts.

We agree with those circuits holding that where a plaintiff seeks relief for an isolated episode of interference with his right of access to a law library, legal materials, or legal assistance, he must allege an actual injury to his litigation. Thus, in *Chandler v. Baird*, 926 F.2d 1057, 1063 (11th Cir. 1991), the court held that actual prejudice was necessary where the "alleged deprivations are of a minor and short-lived nature and do not implicate general policies." See also *Sowell v. Vose*, 941 F.2d 32, 35 (1st Cir. 1991) (drawing a similar line, and noting that the only injury from certain delays was plaintiff's need to seek extensions of filing deadlines); *Sands v. Lewis* 886 F.2d 1166, 1169-71 (9th Cir. 1989) (drawing distinction between an "absolute" deprivation of access to legal materials and a "conditional restriction", for which actual injury must be shown); *Peterkin v. Jeffes*, 855 F.2d 1021, 1039-42 (3d Cir. 1988); *Hossman v. Spradlin*, 812 F.2d 1019, 1022 (7th Cir. 1987); *Holloway v. Dobbs*, 715 F.2d 390, 392 (8th Cir. 1983); cf. *Washington v. James*, 782 F.2d at 1140-41 (Cardamone, J., dissenting) (rejecting majority's view that complaint alleged *regular* interference

with plaintiff's legal correspondence, dissenter would have dismissed the claim for want of "*actual denial* of access to federal courts") (emphasis in original); *Mann v. Smith*, 796 F.2d 79, 83-84 & n.5 (5th Cir. 1986) (requiring actual injury where alleged violation took form of inadequate " 'checkout' system for law books"). This requirement flows from the general principle that some showing of injury is a prerequisite to a constitutional tort action. See, e.g., *Butz v. Economou*, 438 U.S. 478, 504 (1978) ("the decision in *Bivens* [the federal analog of § 1983] established that a citizen *suffering a compensable injury* to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official") (emphasis added); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned."); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("even in the field of constitutional torts *de minimis non curat lex*. . . . A tort to be actionable requires injury.").

The only concrete (legal) injury cited by Crawford-El is the dismissal of one *pro se* action filed in the federal district court in Maryland. See Complaint at 4, J.A. at 18; Opposition to Defendant's Motion for Reconsideration at 6 (May 21, 1990), J.A. at 99. But that action was dismissed on May 4, 1990, well after Crawford-El recovered his legal materials in early February 1990; indeed, the district judge had extended the deadlines for discovery and summary judgment motions to March 27, 1990, and April 26, 1990, respectively. See J.A. at 109-10. Thus, like the plaintiff in *Sowell v. Vose* who secured extensions to accommodate access delays wrongly inflicted upon him, Crawford-El has failed to link his deprivation to any adverse litigation effect.

Crawford-El has also alleged losses completely peripheral to his litigation -- the cost of underwear and shoes during the eight months he was denied access to the clothes in his property; the cost of mailing the boxes from the District to the Florida facility; and emotional distress. See Amended Complaint at 4, J.A. at 18. These do not help show a violation of the *Bounds* right; the character of that right defines the injury requirement. If there is no denial of access to the courts, the presence of legal records in the diverted boxes cannot turn a garden-variety property deprivation into a *Bounds* claim.

III.

Although we hold that Crawford-El's complaint does not satisfy our heightened pleading standard, we remand the case to the district court for repleading. On remand Crawford-El should be permitted to add, if he can, nonconclusory allegations that would show the actual injury necessary to support his *Bounds* claim. Since the proceedings in district court, our *Hunter* decision has made clear the scope of the heightened pleading requirement; as plaintiff prevailed in district court and his pleadings were *pro se*, the case for a remand to comply with those requirements is more compelling than in *Hunter* itself. Permission to file additional amendments to the complaint, such as to raise plaintiff's new First Amendment theory, lies in the sound discretion of the district court. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). We note, however, that even First Amendment claims appear to be subject to a *de minimis* rule. See *Bart v. Telford*, 677 F.2d at 625.

Reversed and remanded.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed May 10, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
Defendant.	)	

ORDER

1. Defendant Patricia Britton's motion to dismiss is DENIED.

2. The District of Columbia is substituted for the District of Columbia Department of Corrections as defendant. Defendant District of Columbia's motion to dismiss is GRANTED.

3. Defendant Britton shall respond to plaintiff's outstanding discovery requests by May 17, 1990.

4. The District of Columbia shall treat plaintiff's outstanding discovery requests as having been served on it as

a non-party and shall respond to the requests by May 17, 1990.

5. Defendant Britton shall file any written discovery requests by May 24, 1990.

6. A further status conference shall be held May 25, 1990 at 9:30 a.m.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: May 10, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed August 31, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
Defendant.	)	

ORDER

This case comes before the court on defendant Patricia Britton's motion for reconsideration of the court's order of May 10, 1990, denying defendant Britton's motion to dismiss, and the opposition thereto.[1] As grounds for her motion, Britton cites the case of Siegert v. Gilley 895 F.2d 797 (D.C. Cir. 1990). Because the court did not consider Siegert when it ruled on defendant's motion to dismiss, it will grant the motion to reconsider.

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[1] The District of Columbia, which is no longer a party to this action having been dismissed by the court on May 10, 1990, unsuccessfully attempts to join in defendant Britton's motion.

Plaintiff is a prisoner who claims that defendant deprived him of his legal materials with the intent of interfering with his access to the courts in violation of the Sixth Amendment and in violation of his due process rights under the Fifth Amendment.

Plaintiff was transferred from the Maximum Security Facility at Lorton, Virginia to the Washington State inlate 1988. After being transferred within facilities within Washington State, plaintiff was informed on July 28, 1989 that he would be returning to Lorton. Instead of being shipped back to Lorton, however, plaintiff was sent to the Western Missouri Correctional Center in Cameron, Missouri on August 9, 1989. Plaintiff's property, including his legal papers from on-going court cases, was not sent to Missouri because plaintiff was only expected to be there a week. When he arrived at Lorton on August 19, 1989, his propety did not arrive despite plaintiff's numerous inquiries to defendant Britton and to the Director of the D.C. Department of Corrections before his journey, and after his arrival. On September 7, 1989, plaintiff was transferred from Lorton to the Federal Bureau of Prisons at Petersburg, Virginia, without first receiving his legal material. While at Petersburg, plaintiff learned that Ms. Britton had contacted his brother-in-law without plaintiff's permission, and arranged for plaintiff's brother-in-law to receive plaintiff's property. Plaintiff finally received his material in February 1990, eight months after being separated from it by defendants.

The Court of Appeals for this Circuit explored the doctrine of qualified immunity and how it applies to cases which necessarily call into question the subjective intent of the government official.

> [W]hen the governing precedent identifies the defendant's intent (unrelated to knowledge of the law)

> as an essential element of the plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of the defendant's alleged unconstitutional purpose.

Id. at 801, citing Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425, 1433 (D.C. Cir. 1987). The court went on to examine the standard of pleading required of plaintiffs in cases involving such allegations. After examining the case law and the general purposes of qualified immunity doctrine, the Court of Appeals concluded that "in order to obtain even limited discovery, such intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent." Siegert 895 F.2d at 802.

Plaintiff, who is representing himself pro se, argues that Ms. Britton had knowledge that the deprivation of his legal papers violated his constitutional rights because plaintiff had informed her so. Therefore he concludes that her failure to insure that his papers were immediately forwarded to him constituted a willful and intentional deprivation of constitutional rights. This sort of proof seems to border on circumstantial, the reliance upon which Siegert forbids. During the course of hearings on the motion to dismiss and the motion to reconsider, however, plaintiff has related to the court direct evidence of defendant Britton's intent. Plaintiff described an incident which took place in 1986 in which defendant Britton told plaintiff that he was a "troublemaker" because he had complained to Washington Post reporters about conditions at Lorton. Plaintiff claims that Britton promised to make his incarceration as hard as possible as a result of his having talked with the reporters. Plaintiff has submitted certified copies of the newspaper articles in which he was quoted. Plaintiff has referred to the threat of Ms. Britton in his opposition to the motion for reconsideration,

but there is no description or reference to the incident in either the complaint or in plaintiff's affidavit attached to the complaint.

Because the plaintiff is a pro se prisoner who is without the advantages of legal training that might assist him in making out a more complete complaint, this court will allow plaintiff an opportunity to amend his complaint to add reference to the incident which took place in 1986 which supports plaintiff's claim that Ms. Britton's intent was to deprive him of his constitutional rights, and that the mishandling of his legal papers was not bureaucratic error.

During the course of hearings on the motion to dismiss and the motion to reconsider, plaintiff has also made reference to unfavorable decisions made in his other cases pending in other courts as a result of his inability to respond without his legal materials. In order to clarify this for the court and for the defendant, the court asks that plaintiff specify in his amended complaint exactly what harm has befallen him as a result of the deprivation of his legal documents, as well as any other harm that occurred because of the handling of his property.

Upon consideration of the above analysis, and for the reasons stated in open court on May 10, 1990, plaintiff shall be allowed to amend his complaint to comply with Siegert v. Gilley 895 F.2d 797 (D.C. Cir. 1990), and to allege his direct evidence of defendant Britton's unconstitutional intent. Therefore, it hereby is ORDERED that:

1. Defendant Britton's motion for reconsideration is GRANTED.

2. Plaintiff shall have 20 days in which to amend his complaint and allege direct evidence of defendant Britton's

unconstitutional intent or the court will dismiss this action based on defendant Britton's qualified immunity.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Aug. 31, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed December 21, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
Defendant.	)	

ORDER

This matter came before the court for a status conference on November 28, 1990.

Plaintiff, who is currently proceeding pro se, was present, as was Assistant Corporation Counsel Kenneth Marty, appearing on behalf of defendant Patricia Britton.

Plaintiff complied with this court's order of August 31, 1990, and filed an amended complaint with allegations of direct evidence of defendant Britton's unconstitutional intent, and with specifications of how plaintiff has been harmed as a result of defendant's actions.

Defendant Britton filed an answer to the amended complaint on November 20, 1990.

At the status conference, defendant's counsel indicated that defendant continues to urge the court to dismiss the amended complaint, for the same reasons originally argued, i.e., that the complaint as amended still fails to state a claim upon which relief may be granted or over which this court has jurisdiction, and that defendant is entitled to official immunity. The court deemed these comments to be an oral motion to dismiss, on the same grounds as originally presented by defendant. Defendant's motion to dismiss is hereby DENIED, for the reasons set forth in the court's order of August 31, 1990, and herein.

Plaintiff is present in this jurisdiction on a writ of habeas corpus ad testificandum issued on March 15, 1990. He shall remain here and shall be held at the D.C. Jail until disposition of this case, or further order of the court.

Plaintiff complained that he has been denied access to the law library at the D.C. Jail. Assistant Corporation Counsel Marty shall file a report with the court no later than January 2, 1990, regarding plaintiff's use of the law library. In his report, Mr. Marty shall also report regarding whether plaintiff has now been allowed to review his D.C. Department of Corrections' file.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Date: Dec.21, 1990

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 91-7023

September Term, 1991
CA 89-03076

Leonard Rollon Crawford-El

U.S. Court of Appeals
For the District of
Columbia Circuit

v.

FILED Feb. 14, 1992

Patricia Britton

Appellant

BEFORE: Buckley, Williams and Lourie,* Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed January 27, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

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* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. §291(a).